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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICI CURIAE* OF SIERRA CLUB, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici are three nonprofit organizations with expertise about the environment who are concerned with protecting it from damage, often irreversible, caused by man. We submit this brief to explain why we believe that the South Carolina Beachfront Management Act is necessary for the protection of public health, safety and the environment and to show that the views expressed in the Brief for the United States fail to accord proper deference to the state legislature's judgment.

The Sierra Club is a national conservation organization having approximately 600,000 members, of whom about 4200 belong to the South Carolina Chapter. The Sierra Club was organized in 1892 for purposes including the exploration, enjoyment, and preservation of scenic and natural resources and to enlist public interest and cooperation in the protection of such resources.

The Humane Society of the United States is the largest animal protection organization in the nation, with more than 1.5 million members and constituents nationwide. In addition to ensuring the humane treatment and protection of animals, the Humane Society is dedicated to preserving habitat upon which the survival of wildlife often depends.

Founded in 1947 as an operating component of the National Academy of Sciences, the American Institute of Biological Sciences (AIBS) is now an independent federation of 47 scientific societies representing more than 80,000 biologists, students and others concerned with the life sciences. AIBS' mission is to address important public policy issues in the life sciences, including environmental, medical and agricultural issues. It provides interdisciplinary advice to government on topics related to global biological diversity.

Pursuant to Supreme Court Rule 37, this brief is filed with the consent of all parties. Letters of consent from counsel have been filed with the Clerk.

STATEMENT

The South Carolina Coastal Council, the respondent, is a state agency created to manage South Carolina's coastal resources. The statutes which it is responsible for implementing were enacted in large measure to implement federal coastal protection policies and to qualify South Carolina's program for federal funds. The history of this program, at both the federal and state level, demonstrates that coastal erosion in South Carolina presents an immediate and serious threat to public health, safety, and the environment and that restrictions on development of oceanfront property, such as those adopted by South Carolina, are the only feasible response to this threat. A ruling by the Court in favor of petitioner here will seriously undermine the ability of South Carolina and the other coastal states to protect their citizens.

1. The Threat to Public Health, Safety and the Environment

Erosion poses serious dangers to lives and property along the South Carolina coast and inland. Unwise coastal development destroys the beaches and the dunes, leaving coastal communities more vulnerable to storm damage and causing irreparable harm to the environment.

The beach/dune system provides long-term stability against the forces of erosion and a protective barrier against storm surge. Structures built on the beach or dune destroy this stability and accelerate the erosion process, both where the building occurs and elsewhere on the coast.[1] Structures built too close to the beach in areas

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[1] In 1971 the Army Corps of Engineers estimated that 20,500 miles (roughly 18%) of the U.S. shoreline was experiencing significant erosion. Continued development is worsening

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subject to erosion will eventually be on the beach as the shoreline retreats under them. Erosion up to and underneath structures undermines them and leads to eventual collapse.[2] When this occurs, not only does the protective frontal dune disappear, but it becomes impractical, if not impossible, for the community to rebuild the dune.[3]

The threat of severe storms to public health, safety and the environment goes far beyond the obvious risk to individual oceanfront property owners who face the destruction of their dwellings and threats to their individual safety. Persons who attempt to wait out a storm on the oceanfront risk the lives of public safety personnel inevitably sent to rescue them. Other public dangers arise when sewage connections to first tier dwellings are severed and septic systems are scoured and uncovered, spreading contamination on shore throughout the flood zone and immediately offshore to shellfish beds.[4] Storm-induced erosion, exacerbated by inappropriate first tier development, ruptures water supply lines, causing salt

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this hazard. *National Flood Insurance Program, 1989: Hearings Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 428 (1989) (statement of Dr. Rutherford H. Platt).

[2] *See id.*

[3] Beach nourishment (trucking in huge quantities of sand to replace what has been eroded) is extremely costly. Beach nourishment generally costs around $1 million per mile of beach and must be replicated every three to ten years. *See* Jones, *Economic Incentives for Environmental Protection: The Coastal Barrier Resources Act*, 21 Envtl. L. 1015, 1023 (1991).

[4] *See* Wang, *Water and Erosion Damage to Coastal Structures – South Carolina Coast, Hurricane Hugo, 1989*, 58 J. Am. Shore & Beach Preservation Assn. 37 (Oct. 1990) (describing the damage done by Hurricane Hugo); Rogers and Sparks, *Damage to Buildings*, 58 J. Am. Shore & Beach Preservation Assn. 48 (Oct. 1990) (further damage description). *See also* Jones, *supra* note 3, at 1023.

water and disease-carrying microorganisms to enter into the entire community's drinking water.

Projectile damage (damage to second and third tier structures caused by wind and wave-driven debris from structures immediately adjacent to the ocean) creates significant peril and cost to coastal communities.[5] Debris from front row structures, when washed inshore or to near-shore inlets, obstructs rescue equipment, ingress and egress from the threatened community and presents a navigational hazard.

There is a strong correlation between property damage and distance from the beach.[6] Storm damage to the first row of buildings is generally much greater than to the second row. Construction setbacks thus reduce both damage to the first tier of structures and projectile damage to buildings farther inland.[7]

Petitioner's lots are located on the Isle of Palms, which is a coastal barrier island. Coastal barriers are sedimentary landforms, such as islands or sand spits, which shield beaches and wetlands from the direct impact of waves, wind, and storm. Because these landforms are constantly accreting and eroding, they are very fragile and are particularly threatened by development. Erosion is causing most barrier islands to move landward at a rate of one to ten feet per year.[8] Congress has recognized that there is a strong national interest in discouraging development on coastal barrier islands and has

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[5] *See* Wang, *supra* note 4, at 40 for a discussion of the hazards faced on Isle of Palms. *See also* Stauble, Eiser, Birkemeier, Hales & Seabergh, *Erosion Characteristics of Hurricane Hugo on the Beaches of South Carolina*, 58 J. Am. Shore & Beach Preservation Assn. 23 (Oct. 1990).

[6] *See* Wang, *supra* note 4, at 37, 40.

[7] *See* Wang, *supra* note 4, at 46.

[8] National Committee on Property Insurance, *America's Vanishing Coastline* 3 (1988) (hereinafter "National Property Insurance Report").

recently acted to deny federal aid, including protection under the National Flood Insurance Program, to new construction on coastal barriers. *See* 16 U.S.C. § 3501 *et seq.* (Coastal Barrier Resources Act of 1982).[9]

Coastal barrier islands are particularly ill-suited for residential development, given their peculiar vulnerability to storms. The majority of the 13,000 deaths during hurricanes in the United States in this century occurred on barrier islands. In 1900, over 6,000 people died in a single hurricane on one developed island in Texas.[10] Nearly 2,000 people on South Carolina's coastal barrier islands died in a single storm in 1893,[11] when these islands were considerably less developed than they are today.

2. The Federal Coastal Management Program

The Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. § 1451 *et seq.*, is a federal statute designed to provide states with money and incentives to carry out national objectives. It is administered by the National Oceanic and Atmospheric Administration ("NOAA"). State programs (and amendments to such

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[9] Federal subsidies have unwittingly played an important role in fostering unwise development and artificially high property values on the barrier islands. No fewer than eight separate federal programs, ranging from EPA-financed sewage projects to FEMA disaster relief, have contributed. *See* Siffin, *Bureaucracy, Entrepreneurship, and Natural Resources: Witless Policy and the Barrier Islands*, 1 Cato J. 293, 295-303 (1981).

[10] *See* Jones, *supra* note 3, at 1025.

[11] *See Coastal Barrier Resources System: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess. 55 (1989) (statement of Dr. Robert Sheets, Director, National Hurricane Center, National Weather Service, National Oceanic and Atmospheric Administration).

programs) are submitted to NOAA for its review and approval.

In 1980 amendments to CZMA, Congress made clear that protecting the public from shoreline erosion and coastal hazards should be a primary concern for NOAA and the coastal states. The 1980 amendments direct NOAA to ensure that state coastal programs "provide for . . . [t]he management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard and erosion-prone areas . . . and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands." 16 U.S.C. § 1452(2)(B). Similarly, the 1980 amendments direct states to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas." 16 U.S.C. § 1458(a)(2).[12]

NOAA has directed the states to consider first setbacks or other controls on development to limit the public's exposure to severe storms, erosion, and other coastal hazards. At present, thirteen states and two territories are implementing NOAA- approved beach set-back laws, and most were developed and implemented with federal monies made available through CZMA.[13]

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[12] In discussing the type of state programs Congress intended to encourage, the House report states that an appropriate policy for a barrier island "may be one which requires all development to be a certain distance from the beach in order to allow the island to provide its natural storm protective function." H.R. Rep. No. 1012, 96th Cong., 2nd. Sess. at 43, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4362 at 4391 (1980).

[13] Maine, Delaware, Florida, Rhode Island, Maryland, Alabama, Hawaii, New York, North Carolina, Michigan, New

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3. The South Carolina Coastal Management Program

South Carolina has implemented the goals of the Coastal Zone Management Act by enacting the South Carolina Coastal Zone Management Act of 1977 ("the 1977 Act") and the 1988 Beachfront Management Act. These programs are administered by respondent and have been undertaken with NOAA's financial support and approval.[14]

South Carolina has regulated its "coastal zone" composed of eight coastal counties and designated "critical areas" since 1978. The 1977 Act charged the Council with developing and implementing an erosion control program, including the protection of necessary sand dunes. S.C. Ann. § 48-39-30(B)(4) (Law Co-op. 1987). The Council promulgated implementing regulations for beach erosion control in 1978, having first consulted with outside experts, a technical advisory committee, and citizen working groups as to what shape the program should take. *See Rules and Regulations for Permitting in Critical Areas of the Coastal Zone* i-ii (1986).

The 1978 erosion control program recognized the dangers of building on barrier islands to public safety and to property; its policies contained numerous warnings of the instability of barrier islands in general and inlet areas in particular. Its policies also noted that parts

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Jersey, South Carolina, Pennsylvania, the Northern Marianas Islands, and Puerto Rico. Houlahan, *Comparison of State Construction Setbacks to Manage Development on Coastal Hazard Areas*, 17 Coastal Mgmt. 219, 220 (1989).

[14] South Carolina's coastal management program was approved by NOAA on September 24, 1979. The Beachfront Management Act was approved as an amendment to South Carolina's program in 1989. (Tr. 123).

of some islands, and indeed entire islands, may be unsuitable for development. South Carolina Coastal Council, *State of South Carolina Coastal Management Program and Final Environmental Impact Statement* IV-53 (1979).

Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the Council. The 1977 critical area was relatively narrow: the area between the highest uprush of the waves and the landward trough of the primary dune. The Council determined the critical area on a case-by-case basis. *See* Note, *The South Carolina Coastal Zone Management Act of 1977*, 29 S.C. L. Rev. 666, 679-680 (1978). To protect the health of the beach/dune system, the Council prohibited the construction of any habitable structure and limited the use of seawalls, bulkheads and other "hard" structures within the critical area; it also set guidelines for alterations of the beach face such as sandbagging, sand scraping, and renourishment. (Tr. 97.) By any measure, the beach/dune system was under a comprehensive regulatory regime by early 1978.

4. The 1988 Beachfront Management Act

Although erosion control had been a priority since the inception of the South Carolina coastal program, the Council had been unable to prevent effectively the continued loss of shoreline. In October of 1986, three months prior to petitioner's acquisition of his beachfront lots, Senator James M. Waddell, Jr. and the Council appointed a Blue Ribbon Committee on Beachfront Management and charged it with investigating beach erosion and recommending the best means to prevent continued coastal erosion and to preserve important environmental and economic values of South Carolina's coastline. The investigation was careful and detailed.

In March 1987, the Blue Ribbon Committee reported findings of fact and policy recommendations to the Council and to the South Carolina General Assembly. In preparing this report, the Committee "agoniz[ed] over how to balance the interest of the private property owner with that of the public."[15] The report's primary finding was that the South Carolina beach/dune system was in a state of crisis with over 57 miles of beach "critically eroding." Blue Ribbon Report at i. The Committee found that "[t]his erosion is threatening the continued existence of the beach/dune system and thereby threatening life, property, the tourist industry, vital state and local revenue, marine habitat and a national treasure." *Id.* The Committee further found that the "primary causes of this crisis include a persistent rise in sea level, poorly planned development which encroaches upon the beach/dune system and a lack of comprehensive beach management planning." *Id.*[16]

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[15] S.C. Blue Ribbon Comm., *Report of South Carolina Blue Ribbon Committee on Beachfront Management* (hereinafter "Blue Ribbon Report") (1987) (cover letter from Erick B. Ficken, Chairman).

[16] In recommending a new policy of a thirty-year erosion setback to the South Carolina General Assembly, the Committee found that the 1977 Act did "not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the beach/dune system. Consequently, uncontrolled and unwise development sited too close to the beach/dune system has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." Blue Ribbon Report at 1-2.

The Committee further found that "it is in the public and private interest to plan a gradual retreat from the beach/dune system by discouraging new construction in close proximity to the beach/dune system and to encourage those who have erected structures too close to the beach/dune system to retreat from the beach/dune system." *Id.* at 2.

The Committee observed that development led to greater erosion. People purchase new houses on the coast, and then learn that their houses are threatened by erosion. They then seek to preserve their homes at any cost, putting in erosion control devices such as seawalls, bulkheads, or rip-rap. As the Committee stated:

> "most erosion control devices result in increased erosion, a drastic lowering of the beach profile (thereby reducing the beach/dune system's tourist and recreational value) and a decrease in the ability of the beach/dune system to protect upland property from storms and high tides. The result of attempting to protect upland property utilizing hard erosion control structures is that dry sand beaches are rapidly disappearing thereby placing many millions of tourist dollars in jeopardy." [Blue Ribbon Report at ii.]

Erosion control structures require making a choice between protecting buildings or protecting the beach, which is usually the most important economic asset of the community. National Property Insurance Report at 1. While beach armoring may protect certain structures, it can be so destructive to the actual beach that both Maine and North Carolina have barred construction of any new erosion control structures. *Id.* at 7. Studies conducted in the Florida Panhandle before and after Hurricane Eloise struck showed that seawalls nearly doubled erosion rates for the areas just beyond their ends. *Id.*

In June 1988, the South Carolina Beachfront Management Act was adopted by the South Carolina General Assembly. The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged the designated critical areas to encompass the area from the mean high watermark to a setback line which is determined by calculating a distance landward from the crest of an ideal oceanfront sand dune which is forty times the annual erosion rate. S.C. Code Ann.

§ 48-39-280 (Law. Co-op. Supp. 1990). This change has generally moved the critical area landward.

The 1988 Act recognizes the highly volatile nature of unstabilized inlets by setting the baseline at the most landward point of erosion at any time during the past forty years.[17] The setback and baselines must be revisited by the Council not less than every eight years and not more than every ten years. S.C. Code Ann. § 48-39-280(C) (Law. Co-op. Supp. 1990). The 1988 Act provides an appeal process for any landowner who feels that the setback line, erosion rate or baseline were set in error. S.C. Code Ann. § 48-39-280(E) (Law. Co-op. Supp. 1990). Petitioner has not challenged the accuracy of the setback line or baseline affecting his lots.[18]

The 1988 Act prohibits new erosion control devices except to protect existing public highways. S.C. Code Ann. § 48-39-290(B)(2)(a) (Law. Co-op. Supp. 1990). Under some circumstances, habitable structures can be constructed within the setback zone but not within 20 feet of the baseline within the no-construction zone. S.C. Code

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[17] In unstabilized inlet areas, such as the one on which petitioner's lots are located, sand movements are dynamic, complex and unpredictable. Tidal flushing through the inlet combines with littoral drift to interrupt the normal flow of sand, creating migrating sand shoals and sand bars. The movement of these sand formations can cause the inlet to migrate, close down suddenly, or expand. Shoals can migrate in the general down-drift direction; these shoals then attach themselves to the downdrift island. During that process, however, severe erosion may take place both ahead of and behind the shoal, creating additional risk from storm surge and erosion. (Tr. 65-66.)

[18] In fact, the consulting firm for the Council which prepared the setback lines was the same consulting firm which prepared the analysis for the Wild Dunes development in which petitioner was a principal. (Tr. 62-63, 90-94.)

Ann. § 48-39-280(B) (Law. Co-op. Supp. 1990). There are restrictions on rebuilding structures damaged by storm or erosion and in some cases habitable structures that are damaged beyond repair cannot be replaced. *Id.*

In 1990, the Beachfront Management Act was amended to allow the Council to issue special use permits to build habitable structures under special circumstances seaward of the baseline. S.C. Code Ann. § 48-39-290 (Law. Co-op. Supp. 1990). Petitioner could apply for such a permit but has not done so.

5. Petitioner and His Property

Petitioner moved to the Isle of Palms in 1978. (Tr. 24, 123.) He was a contractor for a condominium development known as "Wild Dunes". He became a partner in the development and was involved in planning and sales before selling his share of the company. (Tr. 23-24.) With the proceeds of that sale, he purchased two ocean front lots, lots 22 and 24, along Beachwood East Drive on December 3, 1986. (Tr. 23-24.) These lots are the subject of this action.

Petitioner's lots are located in what was designated a "critical area" under the 1977 Act and what is now designated an "unstabilized inlet zone" under the 1988 Act. (Tr. 13). Since 1949, the time from which aerial photographs are available, the shoreline near the lots has behaved with the instability expected in inlet areas. (Tr. 65-66.) In that year, the shoreline was entirely landward of these lots. (Tr. 78.) By 1953, the shoreline had migrated 200 feet seaward, and there was little change through 1957. By 1963, however, the shoreline had eroded to about the center of the street behind petitioner's lots and the lots were underwater at all stages of the tide. (Tr. 82.) By 1968, the shore had eroded a further 100-105 feet. (Tr. 79.) In 1973, a tidal pond covered a significant portion of the lots. (Tr. 82.) Since 1949, the active beach or surf zone has occupied petitioner's property about 50 percent of the time. (Tr. 84.)

From 1973 to the present, the shore line in the immediate vicinity of petitioner's lots has generally been accreting, but it has also been subject to episodic events of severe erosion. (Tr. 13, 20-21.) Between 1982 and 1983, when petitioner was involved in the development of a condominium project near his present lots, the Isle of Palms issued 12 emergency orders for sandbagging to protect property 2,200 feet from petitioner's lots. (Tr. 99.) The Council also issued permits for two revetments – sloping erosion control structures – to protect condominium developments near petitioner's property and one revetment extends to one of his lots. (Tr. 101.) The revetments, one 850 feet and the other 1,300 feet long, were among the longest the Council has ever permitted. (Tr. 101.) To issue the permits, the Council had to find that habitable structures were in imminent danger of collapse. (Tr. 104.) Mariner's Walk, one of the condominium developments behind the revetments, was again threatened in 1987, requiring a beach renourishment project. (Tr. 65.)

Petitioner has not sought a permit which would allow him to build on his remaining two lots. (Tr. 40.) Rather, he seeks to be compensated for the profit he thinks he should have made. Having developed neighboring property in what he knew to be designated a critical area under the more accommodating 1977 regulations, petitioner now asks the state to indemnify him against the informed risk which he took when he purchased his lots.

SUMMARY OF ARGUMENT

Government has a well established right to prevent the use of property if such use is injurious to public health, safety or the environment. The instances where the exercise of such power has been found to require compensation to a property owner have been relatively few and have required more than a showing that the regulation in question has substantially diminished the value of such property. The Court has recognized that all property is held subject to an "implied obligation that the owner's use of it shall not be injurious to the community" and that the state's enforcement of this obligation requires no compensation to the property's owner. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-92 (1987), *quoting Mugler v. Kansas*, 123 U.S. 623, 665 (1887). While this principle may have historical roots in common with the law of nuisance, its application is not limited by tort law doctrines.

The Court should not attempt to articulate a set formula for determining when government regulation constitutes a taking for which compensation is constitutionally required. The question of what justness and fairness require is best approached through an ad hoc factual inquiry which examines the character of government action as well as its economic impact.

The Court's decisions rejecting challenges under the Just Compensation Clause to zoning ordinances and other exercise of the policy power have consistently recognized the need for deference to legislative judgment. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926). What dangers to the public health, safety or the environment exist, what measures are necessary to protect the public, what impact such measures have on various classes of persons and property, and what alternative remedies might have been adopted are complex questions of policy and fact which the Constitution grants the legislative branch the power to determine.

The Beachfront Management Act was enacted by the South Carolina legislature in response to serious threats to public health, safety and the environment. It establishes construction setbacks to protect lives, property, public facilities and the beach/dune system itself from coastal hazards, storm surge and erosion. It represents the legislature's well informed judgment that the land use restrictions it contains are necessary to protect the public from these threats.

Much of the confusion in the lower courts' discussion of whether the South Carolina Beachfront Management Act has effected a taking of petitioner's property appears to stem from his profession that he was not challenging the Act's constitutionality. Yet, by asserting a constitutional right to compensation where none existed statutorily, the complaint could only be construed as challenging the constitutionality of the Act as applied to his property.

By conceding the Act's validity on its face, petitioner admitted the legislative's findings concerning the serious harms of coastal erosion, and that the Act's land use restrictions were as a general matter, reasonably necessary to prevent them. To show that the Act was unconstitutional as applied to him, petitioner needed to show, in addition to substantially diminished value, that application of the restrictions to his specific lots was not reasonably related to prevention of the identified harms. He failed to meet this burden.

Once it is acknowledged that mere diminution in value is not sufficient to establish a taking, petitioner's claim must be rejected and the decision below affirmed. Affirming the decision below would not foreclose the petitioner from seeking a building permit from the South Carolina Coastal Council under the 1990 amendments to the Act. The Court should not consider the application of these amendments to petitioner's property until the Council and the South Carolina courts have first addressed the question.

ARGUMENT

I. THE PURPOSE AND CHARACTER OF GOVERNMENT ACTION DETERMINES WHEN COMPENSATION FOR A SUBSTANTIAL DIMINUTION IN VALUE IS CONSTITUTIONALLY REQUIRED

By urging economic impact as the sole criterion for determining when government is constitutionally required to pay compensation to a property owner adversely affected by it actions, petitioner invites the Court to overturn more than a century's worth of precedent. The Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131 (1978). Government has a long established right to prevent uses of property that cause harm to the "public health, safety, morals, or general welfare"[19] and rarely has such regulation been found to require compensation to be paid to the property owner.

The Court has properly recognized the intensely factual nature of the analysis required by the Fifth Amendment's Just Compensation Clause and therefore has repeatedly refused to adopt a set formula for its application. *See Keystone*, 480 U.S. at 495; *Penn Central*, 438 U.S. at 124; *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Instead, it has articulated a multiplicity of factors which include, in addition to economic impact on the property owner, the character of government action.[20] It is misleading to term this collection of factors "a test." The application of these standards has been truly ad hoc, conducted with respect to specific property, with no

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[19] *Penn Central*, 438 U.S. at 125; *see Mugler*, 123 U.S. at 661.

[20] In *Penn Central*, interference with "investment-backed expectations" was introduced to the takings discourse as a means of evaluating economic impact on the property owner, not as a separate prong to a test. *See* 438 U.S. at 124-25.

single factor or combination of factors outcome determinative.[21]

Diminution in the value of property is a necessary element in any taking claim, but alone has never been a sufficient condition. There have been cases where the taking has been very substantial or even total yet the Court has concluded that compensation is not constitutionally required.[22]

As the Solicitor General has ably demonstrated, there exists a wide variety of governmental activities "that may result in substantial diminution of property values, and yet not require payment of compensation as a condition to its lawful exercise." Brief for the United States at 12. The government may seize and destroy food, drugs,

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[21] In addition to economic impact, investment-backed expectations, and the character of government action, the Court's decisions have identified other factors to be considered, including whether there has been a "permanent physical occupation" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)), whether the restriction on its use results in "average reciprocity of advantage" (*Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922)), whether "public use" is being made of private property (*United States v. Dickinson*, 331 U.S. 745, 748 (1947)), and whether the property is burdened "disproportionately" (*PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 n.7 (1980)). Clearly there is an overlap among the various factors, and none of them can be measured precisely. Such concepts (which have been characterized as "instrumentally and even logically vulnerable") do not represent a true test but simply are a means of explaining the Court's "situated judgment." *See* Michelman, *Takings, 1987*, 88 Columbia L. Rev. 1600, 1628-29 (1988).

[22] *See, e.g, United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (total destruction of oil refinery); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value).

pesticides and other goods without any payment of compensation under many different statutes.[23] During wartime, the government may, without paying compensation, destroy property to prevent it from falling into enemy hands.[24] Similarly, it may be lawful to manufacture and sell a drug one day and a felony to do so the next.[25] When this occurs, existing inventory becomes valueless but no right to compensation arises.

As the Solicitor General has also shown, there are many examples of government actions affecting real property which result in substantially diminished value without any compensation being required or paid. Brief for the United States at 13-14. Examples include condemnation of unsafe structures, building code requirements and restrictions prohibiting construction on steep slopes. Government has long had the right to tear down a building to create a fire break without compensation to the owner.[26] Similarly, damage to property resulting from efforts to control a riot is not compensable.[27] "[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests." *Keystone*, 480 U.S. at 489 n.18 (citations omitted).

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[23] *See, e.g.*, Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 408-09; Federal Meat Inspection Act, 21 U.S.C. §§ 101-05; Toxic Substances Control Act, 15 U.S.C. § 2616; Anti-Monopoly Acts, 15 U.S.C. §§ 6, 11; Falsely Stamped Gold and Silver Act, 15 U.S.C. § 292.

[24] *United States v. Caltex, Inc.*, 344 U.S. at 155.

[25] *See, e.g, Touby v. United States*, ___ U.S. ___, 11 S.Ct. 1752 (1991).

[26] *See Bowditch v. Boston*, 101 U.S. 16, 18-19 (Pa. 1879); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (1788).

[27] *See National Board of Y.M.C.A. v. United States*, 395 U.S. 85 (1969).

Although every generalization in the area of takings law is riddled with exceptions, the Court's decisions have, if anything, focussed more on the character of the governmental action than on economic impact. "Many cases before and since *Pennsylvania Coal* have recognized that *the nature of the State's action is critical in takings analysis.*" *Keystone*, 480 U.S. at 488 (emphasis supplied). Indeed, there have been cases where the character of the government's action alone appears to have been the sole ground for rejecting a Fifth Amendment claim to compensation.[28]

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[28] Conversely, the character of government action has been an extremely important factor in the cases where the Court has found compensation to be constitutionally required. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U.S. at 124. Each of the recent land use cases where the Court has found a taking has involved a physically invasive action which deprived the owner of the property's exclusive use. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In fact, until *Pennsylvania Coal*, it seemed "settled that, to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word." T. Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 519-20 (1857). This view is apparent in the language of Madison's first draft of the Just Compensation Clause, which read: "[n]o person shall be . . . obligated to relinquish his property, where it be necessary for public use, without a just compensation." *See* Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 James Madison, *The Papers of James Madison* 197, 201 (R. Rutland ed. 1977), *cited in* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 711 n.95 (1985). The accounts of congressional debates shed no light on why the language was changed.

Some but not all of these cases have involved nuisance abatement or prevention of uses which the Court has termed "noxious."[29] Yet many of the statutes or ordinances at issue have involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk taking." *Penn Central*, 438 U.S. at 134 n. 30.[30] Many, particularly in the area of land use regulation, have simply sought to prevent "a right thing in the wrong place – such as a pig in a parlor." *Euclid v. Ambler Realty Co.*, 272 U.S. at 388.[31] "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." *Penn Central*, 438 U.S. at 134 n.30.[32] The ultimate question is one of "fairness and justice" in the distribution of public burdens. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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[29] *See, e.g, Reinman v. Little Rock*, 237 U.S. 171, 176 (1915); *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 323 (1905); *Mugler*, 123 U.S. at 670.

[30] *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (brickyard); *Miller v. Schoene*, 276 U.S. 272 (1928) (cedar trees); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (gravel and sand mine).

[31] *See Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding ordinance establishing a setback line); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding ordinance forbidding adult theaters within 500 feet of residential area); *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910) (ordinance forbidding cemeteries within city limits).

[32] We agree with the Solicitor General that it would be "strange to characterize the building of a single-family residence as a 'nuisance'." Brief for the United States at 23. This argument illustrates what is wrong with relying too heavily on the "nuisance" analogy in determining what constitutes a taking. What the history of the Beachfront Management Act shows

(Continued on following page)

Labeling a use "noxious" is often simply the statement of a conclusion and not an explanation of how it was reached.[33] To a beer drinker, the operation of a brewery (*Mugler*) is not a noxious use of property. Presumably not all members of the community agree that showing adult movies is "noxious;" yet the Court has upheld a zoning ban of adult theaters notwithstanding its substantial economic impact on the owners of existing theaters. *Renton v. Playtime Theatres*, 475 U.S. 41 (1986). Trading in legally acquired animal pelts or feathers, although formerly permissible commercial behavior, can be prohibited without compensation. *Andrus v. Allard*, 444 U.S. 51, 64 (1979); *see Defenders of Wildlife v. Endangered Species Scientific Authority*, 659 F.2d 168 (D.C. Cir.), *cert. denied*, 454 U.S. 963 (1981).

The economic impact on the homeowner is the same whether his house is destroyed to prevent a fire's spread

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is that construction of a house on the beach or dune would place another pig in the parlor.

The fact that the legislature has decided not to require the immediate destruction of a house on an adjacent lot simply reflects its judgment that such action would go too far in upsetting reasonable investment-backed expectations. Instead, the legislature has chosen a policy of gradual retreat from the shore which permits existing structures to stand for the remainder of their economic life but not to be rebuilt. The distinction which the legislature has drawn in order to balance private property rights with the public interest is consistent with the axiom that ameliorative action can proceed one step at a time, and should not be second-guessed by the Court. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[33] *See* Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 49-50 (1964); Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 Tex. L Rev. 201, 237 n.119 (1974).

or to permit the widening of a street. Likewise, the property owner's loss from damage incidental to suppression of a riot may be greater than if the government had temporarily occupied his property for military purposes.[34] In each case, it is the purpose and character of the state's action which distinguishes the compensable from the non-compensable event.

II. DEFERENCE TO LEGISLATIVE JUDGMENT IS REQUIRED IN A TAKINGS ANALYSIS

Where the Court has held that a lawful exercise of the police power requires no compensation to an affected property owner, the Court has explicitly or implicitly deferred to the legislature (be it federal or state) on the question of what constitutes the public health, safety, morals or welfare and as to what restrictions are necessary for its protection.

The Court has often recognized the complexity of such questions. *See, e.g., Gorieb v. Fox*, 274 U.S. at 608. Thus, in the case of regulatory legislation, "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). For more than fifty years, legislative exercise of the police power has been upheld where it is not arbitrary or capricious and the measure chosen is reasonably necessary for the accomplishment of a legitimate government purpose. *Pacific States Co. v. White*, 296 U.S. 176, 182 (1935).

This principle is now black letter law. In review of a state's exercise of its police power, the Court has examined only whether the state "could rationally have decided" that the measure adopted might achieve the state's objective. *Minnesota v. Cloverleaf Creamery Co.*, 449

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[34] *Compare National Board of Y.M.C.A. v. United States*, 395 U.S. 85 (1969), *with United States v. General Motors*, 323 U.S. 373, 378 (1945).

U.S. 456, 466 (1981). The Court has recognized that it does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Yet in most of these garden-variety police power cases, the statute in question had an adverse economic impact on the party challenging it, and sometimes a quite substantial one.[35]

Invocation of the "takings" clause should not cause the Court to jettison the deference inherent in the *Carolene Products* standard. The Court's seminal takings decision recognized that "courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives." *Mugler*, 123 U.S. at 662. Almost any aggrieved property owner claiming a denial of due process or equal protection can recast his challenge to regulatory action as a "taking."[36] In rejecting a takings challenge to statutory provisions which had been previously upheld as a legitimate exercise of the police power under a due process analysis, the Court stated:

> Although [the prior decisions] were due process cases, it would be surprising indeed to discover that in both cases Congress unconstitutionally had taken the assets of the employers there involved. [*Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 223 (1986).]

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), did not repudiate the principle of deference. In

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[35] *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955) (opticians barred from fitting eyeglasses or grinding lenses without prescription); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (ban of milk with vegetable fat added); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (ban on manufacture or sale of oleomargarine).

[36] *See* Michelman, *Takings, 1987*, 88 Columbia L. Rev. at 1613.

reviewing earlier decisions holding that a use restriction must substantially advance a legitimate state interest to pass muster under the Just Compensation Clause, the Court recognized that "a broad range of government purposes and regulations satisfies these requirements." *Id.* at 834-35. It found that the condition which the Commission had attached to the Nollans' building permit amounted to the "appropriation of a public easement" and was not "reasonably related to" the burdens which the new house would create under "even the most untailored standard." 483 U.S. at 834, 838.

Nollan suggests that a somewhat stricter scrutiny of means and ends is required where the character and purpose of government action is such (e.g., a physical occupation) that the state's claim to be acting under the police power is suspect. It would be strange to view a construction setback requirement in that way. Such requirements have been recognized as permissible since *Gorieb v. Fox*. Unlike the easement required in *Nollan*, the Beachfront Management Act's use restrictions are not physically invasive and do not interfere in any way with petitioner's right to the exclusive use and enjoyment of his property.

The Court's decisions upholding the validity of zoning ordinances have consistently recognized the need for deference to the legislature's judgment. In the first takings challenge of a zoning ordinance to reach the Court, it stated:

> The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in term of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some

> industries of an innocent character might fall within the proscribed class. [*Euclid v. Ambler Realty Co.*, 272 U.S. at 388-89.]

Thus, the Court has indulged a "presumption of constitutionality" when land use restrictions are challenged on takings ground, just as it has done when regulation is challenged on the basis of the due process and equal protection clauses. *See Goldblatt v. Hempstead*, 369 U.S. at 594.

III. THE BEACHFRONT MANAGEMENT ACT REPRESENTS THE WELL-INFORMED JUDGMENT OF THE SOUTH CAROLINA LEGISLATURE CONCERNING MEASURES NECESSARY TO PROTECT PUBLIC HEALTH, SAFETY AND THE ENVIRONMENT

The Beachfront Management Act represents the South Carolina legislature's well informed judgment that the measures it contains are necessary to protect against serious threats to public health, safety and the environment. The history of South Carolina's coastal management program demonstrates that the construction setbacks which it establishes are necessary to protect lives, property, public facilities and the beach/dune system itself from coastal hazards, storm surge and erosion. The legislature's findings are not contested and alone are a sufficient basis to uphold the Act's constitutionality.

The South Carolina legislature has properly concluded that coastal erosion presents an immediate threat to lives, property, the ecosystem and South Carolina's tourist economy.[37] It has also accurately found that development exacerbates erosion by destroying the natural dunes and disrupting the beaches' pattern of accreting and shifting sand.[38] These conclusions are supported by

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[37] See discussion at 2-5, 9, *supra*.

[38] See discussion at 2-3, 10, *supra*.

the report of a fact-finding committee, by federally funded studies, by the findings and legislature history of three federal statutes, and by a broad body of scientific and technical literature.

South Carolina's Beachfront Management Act is a carefully crafted response to the problem of coastal erosion, enacted after less restrictive measures proved ineffective. Its policy of a gradual retreat from the shore represents a rational balancing of private property rights and the public interest. The legislature has accurately recognized that there is no engineering solution to erosion on a coast-wide basis. Studies have repeatedly concluded that beach armoring solutions, such as seawalls, cause increased erosion to other parts of the coast and do not provide effective protection against storm surge.[39] Experience on the Isle of Palms confirms this. Neither this evidence nor the legislature's findings have been contested by petitioner.

The Court has long recognized that "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare." *Day-Brite*, 342 U.S. at 423. Clearly construction setbacks are rationally related to the objectives of preserving the coast and preventing harms to the public arising from coastal erosion.

IV. PETITIONER HAS FAILED TO CHALLENGE WHETHER APPLICATION OF THE BEACHFRONT MANAGEMENT ACT TO HIS PROPERTY IS REASONABLY RELATED TO THE ACT'S OBJECTIVES

The decision below has properly deferred to the South Carolina legislature's judgment that "there is an evil at hand for correction" and that the Beachfront Management Act is "a rational way to correct it." *Williamson v.*

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[39] See discussion at 10-12, *supra*.

Lee Optical of Oklahoma, Inc., 348 U.S. at 484. The stricter scrutiny which the Solicitor General is urging here would undermine the principle, recognized in the Court's takings jurisprudence from *Mugler* to *Keystone*, that "debatable questions as to reasonableness are not for the courts but for the legislature." *Goldblatt v. Hempstead*, 369 U.S. at 595 (citations omitted).

Notwithstanding professions to the contrary, petitioner's action is a challenge to the constitutionality of the Act as applied to his property. The Act (prior to the 1990 amendments) contained no provisions for paying compensation to any affected property owner. By asserting a constitutional right to compensation where none existed statutorily, the complaint could only be so construed.

Both because the petitioner was the plaintiff in the proceedings below and because the Beachfront Management Act is entitled to the "presumption of constitutionality," he had the burden of proof on reasonableness. *Goldblatt v. Hempstead*, 369 at 595-96; *see Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Yet petitioner has failed to challenge the Act in any way, save that it has an adverse economic impact on him.[40]

The Solicitor General is misguided in his suggestion that "a more searching inquiry was required at the threshold to determine which of the purposes of the Act were actually implicated in application of the building restrictions to petitioner's lots." Brief for the United States at 20. Each of the Act's stated purposes describes a

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[40] Petitioner's property has not been "singled out" to bear the burden of South Carolina's attempt to remedy the problem of coastal erosion. The Act's restrictions apply to all property within the critical zone. *See Nollan*, 483 U.S. at 835 n.4. Although the Act does not require the destruction of existing structures, reconstruction or alterations to existing structures seaward of the setback line are subject to the same prohibitions and limitations as new construction. *See* S.C. Code Ann. § 48-39-290(A)-(B) (Law. Co-op. Supp. 1990).

benefit to the public which will flow to the public from prevention of the harm of coastal erosion, but in each case the *harm* to be prevented is the *same*.

Petitioner has not questioned the existence of the harms at which the Act is aimed, nor that establishing a setback line is related to those harms' prevention. Although the Act provides for the use of a different baseline when it can be demonstrated that "the shoreline is unlikely to return to its former position" (S.C. Code Ann. § 48-39-280(E) (Law. Co-op. Supp. 1990)), petitioner has not challenged where the baseline was set. He has not attempted to show that development of his land will not contribute to coastal erosion nor that the state had any less burdensome or less restrictive alternative means to accomplish the legislative purpose whose lawfulness he concedes.[41]

In taking the lower courts to task for failing to discuss the relationship of the statutory requirements to public health and safety measures, the extent to which the Act's purposes were furthered by its application to petitioner's lots, or the "degree, likelihood, or proximity of the identifiable harms to which the Act is addressed,"[42] the Solicitor General is urging the Court to reverse the traditional presumption of constitutionality and shift the plaintiff's burden to the state *even on questions petitioner did not raise*. There is a wealth of

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[41] Ordinarily one would expect questions such as less restrictive alternatives to be raised at a hearing on a permit application. Since petitioner has never sought a building permit or challenged administratively the setting of the baseline, there is an issue as to whether any justiciable controversy concerning such questions exists. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91 (1985).

[42] Brief for the United States at 22-23.

information in the record below or subject to judicial notice showing that the coastal zone management program adopted by South Carolina is the only feasible means of protecting the public from very serious harms attendant upon unwise development of coastal property. However, it is not the function of the courts to raise such questions sua sponte or to sift and weigh such evidence de novo. *See Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

V. BECAUSE PETITIONER HAS IGNORED HIS BURDEN OF PROOF, THE DECISION BELOW MUST BE AFFIRMED

To show that the Act was unconstitutional as applied to his land after conceding its facial validity, petitioner had to show that application of the restrictions to his land was not reasonably related to the prevention of coastal erosion as well as that he had suffered economic loss. Because petitioner made no attempt to meet this burden, the decision below should be affirmed. Any other conclusion would deny the state the "reasonable margin to insure effective enforcement"[43] of its police power objectives to which it has long been held entitled.

On the other hand, affirming the decision below will not foreclose petitioner from seeking a building permit from the South Carolina Coastal Council under the 1990 amendments to the Act. If denied, judicial review of the Council's decision would be available under the standard stated in those amendments. In such proceedings, the statute now places the burden on the state to show that restrictions placed on the aggrieved landowner's property are not an unreasonable exercise of the police power. S.C. Code Ann. § 48-39-290(D) (Law. Co-op. Supp. 1990). If the landowner prevails, the courts must either direct

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[43] *Euclid*, 272 U.S. at 388-89.

that the necessary permits be issued or that reasonable compensation be paid. *Id.* The Court should not consider the application of the new standard to petitioner's property until the South Carolina courts have first addressed it. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941).

Respectfully submitted,

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